IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 30TH OCTOBER 2007 / 8TH KARTHIKA 1929

RFA.No. 532 of 2005()

OS.67/2002 of SUB COURT, TIRUR
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APPELLANTS/DEFENDANTS 1 AND 2.
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1. ANWAR SADATH, S/O.ALI MASTER,
VADAKKEOREA, CHERUKAVU AMSOM,CHEVAYUR DESOM,
TIRUR TALUK.

2. ALUNGAL SULAIKHA, D/O.AHAMMED KUTTY,
CHERUKAVU AMSOM, CHEVAYUR DESOM, TIRUR TALUK.

BY ADV. SRI.T.KRISHNAN UNNI

RESPONDENTS: PLAINTIFFS AND DEFENDANTS 3 AND 4.
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1. ABDUL AZEEZ, S/O.MUHAMMED,
PARAYIL THEOTT,CHERUVKAVU AMSOM,
CHEVAYUR DESOM, TIRUR TALUK.

2. KOLLOLI AHAMMEDKUTTY, S/O.ABDULLAKOYA,
CHERUKAVU AMSOM, CHEAYUR AMSOM, TIRUR TALUK.

3. KOLLOLI FASEELA, D/O.UNNIMAMMAD,
CHERUKAVU AMSOM, CHEVAYUR DESOM,
TIRUR TALUK.

BY ADV. SRI.P.K.SAJEEV
R1 BY ADV. SRI.T.M.ABDUL LATHEEF
R2&3 BY ADV. SRI.A.MOHAMED RASHEED

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 30/10/2007, THE COURT ON 30/10/2007 DELIVERED THE FOLLOWING:

P.R. RAMAN & V.K.MOHANAN, JJ.

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R.F.A. No.532 of 2005

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Dated this the 30th day of October, 2007.

JUDGMENT

Raman, J.

The defendants 1 and 2 in O.S. No.67/2002 on the file of the Sub Court, Tirur are the appellants. The suit is one for specific performance of the contract. According to the plaintiff, the defendants by agreement dated 31.5.2000 agreed to sell Cherukavu ALP School building, the immovable property in which the school is situated and also the management of the school for a total consideration of Rs.15,25,000/-. An amount of Rs.5 lakhs was paid by the plaintiff towards sale consideration on 31.5.2000. Possession of the school, its building and property and the right to management was given to the plaintiff on the same day. Out of the balance consideration an amount of Rs.2,50,000/- was agreed to be paid on or before 15.8.2000 and the defendants agreed to transfer the management of the school in the name of the plaintiff. The further balance of Rs.7,75,000/- was to be paid before 15.11.2000 and it is at that time that the sale deed was to be executed. Subsequent to the agreement there was a further extension to comply with the terms upto 28.2.2001. According to

the plaintiff, he has carried out necessary repair works and incurred an amount of Rs.75,000/- towards the same. Though the plaintiff was ready and willing to perform his part of the contract and contacted the first defendant on several occasions and was also ready with the cash of Rs.2,50,000/- before the date stipulated, the defendants did not take any step. Thus committed breach. After issuing a lawyer notice the plaintiff instituted the suit. He also contended that even to the suit notice, no reply was given by defendants 1 and 2. Defendants 3 and 4, however, admitted the agreement. The suit was therefore instituted for a decree of specific performance of the contract. Alternate prayer for the realisation of advance sale consideration of Rs.5 lakhs with 18% interest was also made. Besides, an amount of Rs.75,000/- spent for repairs was also claimed.

2. Defendants 1 and 2 in their written statement contended that the school originally belonged to one Madhavan Ezhuthachan from whom defendants purchased the same along with the right to manage the school as early as in 1980. Subsequently the sale deed was executed on 8.12.1983.

But the management right was not transferred by Sri.Madhavan Ezhuthachan. Later Madhavan Ezhuthachan died on 20.11.1995. The first defendant was appointed as the Manager by the educational authorities and he is the present Manager. The execution of the agreement is not disputed. Receipt of consideration of Rs.5 lakhs was also not disputed. But according to the defendants, the amount was paid to the 4th defendant and not to defendants 1 and 2. According to them, the plaintiff is not entitled to discretionary relief. The school properties and management are with the first defendant. Possession was not delivered to the plaintiff. Plaintiff was not ready and willing to perform his part of the contract. They prayed that the plaintiff be non-suited.

3. Defendants 3 and 4 in their separate written statement admitted the execution of the agreement as also the advance consideration of Rs.5 lakhs. But according to defendants 3 and 4, advance consideration was received by the first respondent. Defendants 3 and 4 were paid their share amounting to Rs.1,85,000/-. The 4th defendant even expressed to comply with the

remaining part of the contract on payment of balance sale consideration.

4. The court below framed necessary issues. The evidence consists of oral evidence of PWs 1 and 2 on the side of the plaintiff and DW1 on the side of defendant. Besides, A1 to A6 and B1 were marked respectively on the side of the plaintiff and defendants.

5. The court below found that the suit is maintainable and that the agreement is valid and enforceable. It also found that the plaintiff was ready and willing to perform his part of the contract and thus entitled for a decree for specific performance.

6. While considering the maintainability of the suit, the main contention advanced by the defendants was that it is not an agreement specifically enforceable under law. According to defendants 1 and 2, the contract is void. This argument was raised placing reliance on Rule 5(a) of Chapter III of the Kerala Education Rules. In the course of argument, however, the contention based on Section 6 of the Act as such was not seriously pressed. Even otherwise, we find that Section 6 of the Kerala

Education Act only puts restriction on the alienation of property of an aided school. Prohibition contained in Section 6 is only against property belonging to the school and not the school as such. If what is sold or proposed to be sold is the entire school building with all its assets and the right of management, what is sold or proposed to be sold is a running school to which Section 6 may not apply. The same view was taken by this court in an earlier decision reported in P.V.JOHN V. DIRECTOR OF PUBLIC INSTRUCTIONS (1975(2) ILR Kerala 604). Though the said decision was rendered by a learned Single Judge of this court, we have carefully considered the provisions contained in Section 6 and perused the above judgment and we are in complete agreement with the view expressed therein.

7. The next submission was based on Rule 5(a) of Chapter III of KER as per which no change of management of any aided school involving change of ownership shall be effected except with the previous permission of the Director. The Director may, however, grant such permission unless

the grant of such permission will in his opinion adversely affect the working of the institution and the interest of the staff and the person to whom the management is transferred. Sub-section (2) provides for an appeal to a person aggrieved by any order that may be passed under sub-rule (1). For our purpose sub-rule (3) which protects interest of Rule 5(1)A claimant under Chapter XIV A may not be relevant. Thus, on a reading of the above provision it can be seen that whenever there is a change of management of an aided school involving change of ownership, the same shall be effected with previous permission of the Director. The agreement itself provides that in order to effect such changes in favour of the plaintiff, the defendants have to submit necessary application thereof, the expenses of which will be met by the plaintiff. Therefore, when an agreement itself contains provision to seek permission from the authorities, it cannot be said that the agreement is in violation of Rule 5(a). On the other hand, the clauses contained in the agreement is consistent with the above provision. Therefore, the contention that the agreement is void in view of Rule 5(a) of Chapter III does not

appeal to us.

8. The learned counsel appearing for the appellants contended that the agreement is not specifically enforceable under law. According to them, the right of management of the school was with Madhavan Ezhuthachan and his right had devolved on his legal heirs and the agreement provides for transfer of such right and obliges the transferor to obtain consent and make necessary application before the educational authorities and further undertakes that the transferor will before the due date obtain necessary orders from the educational authorities for transferring such right in favour of the plaintiff. According to them, as per the abovesaid clause the intervention of the educational authorities is needed before actually effecting the transfer. In other words, according to them, whether or nor such right should be transferred is a matter for the statutory authorities to decide in an application to be moved by the parties. Ultimately, such transfer may or may not be effected, on which the defendants have no say. Such a clause requiring the sanction of an authority and compelling one of

the parties to obtain such sanction according to them, has thus rendered the agreement void or unenforceable. In answer to the above contention, we may refer to some of the decisions on the point. In NATHULAL V. PHOOLCHAND (AIR 1970 SC 546) the apex court held that where by a statute the property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned. That is a case where the appellant was the owner of a coconut factory constructed on a plot of agricultural land which stood recorded in the Revenue records in the name of C, his brother. N agreed to sell to one P, the said land along with the factory after receiving part payment and put him in possession. P agreed to pay the balance consideration. Terms were agreed and reduced to writing. On failure to pay the balance consideration, N rescinded the contract and commenced action for a decree for possession of the land. The suit was eventually decreed. On appeal, the High Court declared that N was entitled to balance

consideration as also the mesne profits provided till the date on which the amount was deposited by P, by which an amount of Rs.25,000/- was deposited by P within two months of passing the decree. Subject to this condition P was allowed to retain possession. On further appeal before the Supreme Court, the question arose for consideration was as to whether by virtue of Section 70(4) of the Madhya Bharath Land Revenue and Tenancy Act, when P was not being an agriculturist, the land could not be sold to him without previous sanction of State Government and in the absence of any specific clause, a clause providing that N will secure the sanction under Section 70(4) of the Act was held to be implied, for it is settled law that where by statute the property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed to be subject to the condition that the transferor will obtain the sanction of the authority concerned. The above is an authority of proposition that in a given case when the transfer is to become complete, necessary sanction from any statutory authority is required, it can even be implied as a term of

the contract on the part of the transferor to get such sanction. Admittedly, in the present case there is a specific clause in the deed itself obliging the transferor to get necessary sanction. On the other hand, the above decision only shows that such pre-conditions for effecting the transfer will not make the deed void.

9. In this case the defendants had purchased the entire right including the right of management from Madhavan Ezhuthachan in the year 1980. But no document was executed. But DW1 in his deposition stated that they were managing the school and everything was done in the name of Madhavan Ezhuthachan. The sale deed was later executed in 1993. But the management was not transferred in the name of defendants. Subsequently Madhavan Ezhuthachan died on 20.11.1995. On 7.6.2001 the Assistant Educational Officer, Kondotty issued a proceedings by which first defendant was appointed as Manager with retrospective effect from 20.11.1995 to 20.11.2005. Ext.B1 is the proceeding in evidence thereof. As per this proceedings Sri.Madhavan Ezhuthachan before his death had

transferred the management including the properties to the defendants.

10. It was then contended that there is no averment as such in the plaint that the plaintiff was ready and willing to perform his part of the agreement. In this connection it was pointed out by the appellants that there is no specific averment that the plaintiff is prepared to meet the expenditure required for obtaining the necessary sanction in terms of the agreement. We have scanned through the agreement. We could gather from the agreement that the parties have agreed that in order to effect transfer as a running school, not only the immovable property but also the right of management of the school has to be transferred. The advance consideration of Rs.5 lakhs was paid and the balance consideration was to be paid later after obtaining necessary sanction from the authorities transferring the right of management as well. For that purpose, the transferor has to necessarily make an application agreeing to transfer the right of management in favour of the transferee. Therefore, as part of the obligation, the agreement provided that the transferor shall submit necessary application in this

regard. We have already found that such a clause is perfectly valid. Further, there is no case for the appellants-defendants that all necessary applications were prepared or submitted before the authorities. It is true that the burden is on the plaintiff to prove that he has discharged his part of the obligation as per the contract. But his part of the obligation arises with regard to the payment of balance consideration only when transfer of the right of management is effected. Unless signatures of the parties concerned are obtained, no further steps could be done in furtherance thereof. What is agreed upon is to meet the legal expenses required. It has not been brought to our notice that any such fee is prescribed under the KER for effecting the transfer of such management. As such there is no merit in the contention that in the absence of any specific averment that the plaintiff was always ready and willing to perform his part of the obligation in meeting the necessary expenditure, the plaintiff is to be non-suited . The court below after analysing the evidence on record and after consideration of the agreement Ext.A1 found that the plaintiff and defendants have executed

Ext.A1 which is valid in law and the suit is maintainable.

11. The court below also found while considering issue No.3A that Ext.B1 would show that the first defendant submitted a proposal on 10.4.2001 to appoint him as the Manager of Cherukavu ALP School. The plaintiff had to pay the second instalment of Rs.2,50,000/- on 15.8.2000, if the defendant had applied for permission. But no such permission was applied for. On the other hand, the defendants' contention was that they are not in management of the school. But on the basis of testimony of DW1 the court below came to the conclusion that the actual management was in the hands of the defendants. True that unless a transfer takes effect in favour of the defendants as approved by the educational authorities, a further transfer by the defendants in favour of the plaintiff may not be possible, that too, without sanction from the educational authorities. All the same, it was the obligation of the defendants to submit necessary application in this regard so as to complete the transfer in terms of Ext.A1. So long as no such application been submitted, the further obligation for the

plaintiff to pay balance consideration did not arise. Hence the finding of the court below that the plaintiff was ready and willing to perform his part of obligation does not call for any interference by this court. The endorsements contained in Ext.A1 were relied on by the appellants to contend that time was extended since both sides wanted some time to perform their respective obligation. Unless it is shown that what is the further obligation to be discharged by the plaintiff except regarding the expenditure referred to already, we do not find any basis in this contention. The endorsement contained in Ext.A1 for extending the period certainly was agreed to by both sides. That does not mean in the absence of anything expressly stated in Ext.A1 referring to any obligation on the plaintiff to perform at that stage, that the endorsement containing a clause that both sides agreed to extend the time for performance implies that anything further has to be done by the plaintiff.

12. Though this granting of specific relief is discretionary, it is settled law that such discretion has to be exercised in an objective manner having

due regard to all the facts and circumstances. Based on Ext.A1 agreement advance payment was made and the plaintiff was also put in possession of the properties. When there is a failure on the part of the defendants to perform their part of the obligation to apply for necessary sanction from the educational authorities and on their failure to do so, when the plaintiff has approached the court for appropriate relief, it cannot be said that the discretion exercised by the court below is in any way wrong. The court below having exercised its discretion properly, we do not find any reason to interfere with the relief already granted.

13. In the result, we find no merit in the appeal. Accordingly the same is dismissed.

14. Since we have already confirmed the decree passed by the court below, it is open to the plaintiff to seek necessary directions from the court below with regard to future appointment, when an occasion arises for filling up vacancies.

Since it is represented that the entire amount has since been deposited

by the plaintiff, the court below may expedite the further proceedings without delay.

P.R.RAMAN
Judge

V.K.MOHANAN
Judge

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